Supreme Court, U.S.
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No. 00-254

In The

Supreme Court of the United States

DON SUNDQUIST, Governor of Tennessee, *et al.*,

Petitioners,

v.

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

1. Respondents have failed to present any grounds to rebut petitioners' arguments that the issue in this case warrants this Court's review. The court of appeals granted Section 2 plaintiffs essentially unfettered freedom to manipulate the "area of dispute" and, hence, the critical numerical component of vote-dilution analysis. Respondents cannot deny the broad importance of that legal ruling for redistricting throughout the Nation.

Although respondents try to argue otherwise, the record of this case highlights the license to manipulate the analysis and later the ultimate result. Petitioners filed a Motion for Summary Judgment on the grounds that "once Shelby County is included in the court's frame of reference, the number of majority-African-American districts is substantially proportional to the black voting age population's share of the total population in the relevant seven-county area [of west Tennessee.]" Pet. App. 32a. As a result of this Motion, the district court specifically requested in an order of March 13, 1997, that respondents specify whether they intended to include Shelby County in their challenge. *Id.* at 33a. In responding to the district court order, Respondents stated that their Second Amended Complaint was now "limited to a claim of vote dilution in the six-county region of Tennessee including, Fayette, Hardeman, Haywood, Lauderdale, Madison, and Tipton Counties." *Id.* This position is directly contrary to the allegations in the Second Amended Complaint in

which Respondents had specifically included Shelby County in the "area of dispute."[1]

Respondents altered their position by removing Shelby County from the "area of dispute" because had they not done so the district court would have granted summary judgment in favor of Petitioners. The district court expressly stated: "In short, if the court considers statewide statistics or includes Shelby County in its proportionality analysis for rural west Tennessee, the plaintiffs will not prevail on their vote dilution claim." *Id.* at 38a.[2] (Emphasis added) These facts demonstrate the

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[1] In their Second Amended Complaint, Respondents alleged that "[t]he personal plaintiffs reside in the seven-county area in West Tennessee – Fayette, Hardeman, Haywood, Lauderdale, Madison, Shelby, and Tipton – where new majority African-American legislative districts can be drawn." (R., 172: Second Amended Complaint, ¶ 5.) Having defined "West Tennessee" to include Shelby County, Respondents then defined the "area of dispute" for purposes of the third prong of *Gingles* as follows: "Candidates for elective office preferred African-Americans in Tennessee, including West Tennessee, are usually defeated by the white majority voting as a bloc." (R., 172: Second Amended Complaint, ¶ 32)

[2] Respondents also argue that Petitioners "repeatedly misrepresent that the lower courts ignored statewide figures in conducting proportionality analysis." Brief in Opposition to Petition for Writ of Certiorari, p. 5. Yet, if the district court concluded that "if the court considers statewide statistics . . . in its proportionality analysis for rural west Tennessee, the plaintiffs will not prevail on their vote dilution claim," then how could the district court have considered statewide statistics and found vote dilution other than to have ignored the statewide statistics. Furthermore, the lower courts' decisions simply do not square with the Senate version of this same case in which this Court affirmed the three-judge panel's holding that there

importance, in individual cases and in Section 2 litigation generally, of the Sixth Circuit's rule remitting the selection of the "area of dispute" to the self-interested discretion of plaintiffs who, as in this case, will narrow the "area of dispute" so as to ensure a lack of proportionality in attempting to prove minority vote dilution. The ruling below merits review.

3. Respondents assert that "[t]his case no longer has the aspect of a 'real and substantial' controversy" and is, therefore, "moot." Br. In Opp. at p. 13. If the consequences identified in the petition are not enough to keep the case alive, the appropriate action for this Court is to vacate the decision below with an order that the case be dismissed. This Court has long held that when a civil case coming from a federal court "has become entirely moot, it is the duty of the appellate court" not merely to dismiss the appeal but "to set aside [that is, vacate] the decree and to remand the cause with directions to dismiss." *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936). In *United States v. Munsingwear Corp.*, 340 U.S. 36, 39-41 (1950), this Court explained that vacating the judgment below prevents the judgment from becoming *res judicata* and "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." Given the

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was no minority vote dilution in the 1992 Senate Plan which had lower ratio of majority-black districts to total districts (28.57% for Southwest Tennessee) than the 1994 House Plan (42.53%). *See Rural West Tennessee African-American Affairs Council, Inc. v. Sundquist*, 516 U.S. 801 (1995).

importance of the issue presented, that is the appropriate disposition if the judgment below is not reviewed.

By the time this Court remands this case to the Sixth Circuit, and the Sixth Circuit in turn remands it to the district court, and the district court orders dismissal, the general election on November 7, 2000, will have occurred under Plan B of the 1994 House Plan, as ordered by the district court. If this case is now moot because respondents will now obtain the relief they ultimately requested, *i.e.*, election under a house plan in which there is a majority-black district in rural west Tennessee, then this Court should, in the words of *Kelly v. Bennett*, 95 F. Supp. 2d 1301, 1306-07 (M.D. Ala. 2000), "wipe the slate clean" so that the Sixth Circuit decision as to the 1994 House Plan in no way binds petitioners in the upcoming 2000 redistricting of the Tennessee House of Representatives. Otherwise, this Court should grant certiorari.

CONCLUSION

The petition for writ of certiorari should be granted or the court should vacate the judgment of the court of appeals with an order to dismiss this case.

Respectfully submitted,

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